UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: ANY AND ALL FUNDS HELD IN REPUBLIC BANK OF ARIZONA ACCOUNTS XXXX1889, XXXX2592, XXXX1938, XXXX2912, AND XXXX2500,

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UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JAMES LARKIN, Real Party in Interest Defendant; JOHN BRUNST, Real Party in Interest Defendant; MICHAEL LACEY, Real Party in Interest Defendant; SCOTT SPEAR; Real Party in Interest Defendant.

Movants – Appellants.

No. 18-56455

D.C. No. 2:18-cv-06742-RGK-PJW
U.S. District Court for
Central California, Los Angeles

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Other Authorities

DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE

James Larkin, John Brunst, Michael Lacey, and Scott Spear (collectively "Movants") hereby respond to this Court's Order to Show Cause why appeal of the district court's October 23, 2018 stay order (the "Stay Order") should not be dismissed as a nonfinal or nonappealable order pursuant to 28 U.S.C. §§ 1291, 1292(a)(1). *Order*, Doc. No. 2. This case arises from Movants' challenge in the district court to a series of unlawful seizures of publishing assets and proceeds in violation of the First Amendment, and the Stay Order on appeal was the product of the government's effort to avoid ever having to respond to the substance of Movant's constitutional claims.

It has been established law for decades that the First Amendment bars the government from seizing or encumbering the assets or financial proceeds of publishing activities prior to conviction or, at the very least, an adversary hearing in which the government has the burden of proof. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Adult Video Ass'n. v. Reno*, 41 F.3d 503 (9th Cir. 1994). *See Citizens United v. FEC*, 558 U.S. 310, 336-337 (2010) (laws suppressing speech "may operate at different points in the speech process," including by "imposing a burden by impounding proceeds on receipts or royalties"); *Center for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 649-650, 657 (E.D.

Pa. 2004) (even for materials that may be "completely banned," *Fort Wayne Books* requires that a court "make a final determination that the material is [unprotected by the First Amendment] after an adversary hearing"). A showing of probable cause is *never* sufficient to justify such a seizure. *Fort Wayne Books,* 489 U.S. at 66. Ignoring these principles, the federal government seized millions of dollars of Movants' assets based on nothing more than *ex parte* allegations of probable cause that the operation of the classified advertising website Backpage.com was associated with criminal activity. Movants' challenge to the seizures, and to the process the government used to accomplish them, was effectively terminated by the district court Stay Order under review.

This Court has repeatedly held that orders seizing or restraining assets are appealable as injunctions under Section 1292(a)(1), which confers appellate jurisdiction over orders "granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1). In this case, the district court's stay order has the effect of continuing the injunction. Even if that were not the case, this Court has recognized the ability to seek immediate appeal under 28 U.SC. § 1291, where the grant of a stay leaves a party "effectively out of court." *Davis v. Walker*, 745 F.3d 1303, 1308–10 (9th Cir. 2014). More importantly for purposes of the specific issues presented here, the Supreme Court has held that "[a]djudicating the proper scope of First Amendment protections has often been recognized … as a 'federal policy' that

merits an application of an exception to the general finality rule." *Fort Wayne Books,* 489 U.S. at 55.

This case involves the preemptive seizure of assets and publishing proceeds that are presumptively protected by the First Amendment, and any stay of the civil proceedings below, with deferral of consideration of constitutional claims to the end of associated criminal proceedings, effectively decides the issues and leaves Movants without a remedy. Under these circumstances, this Court has jurisdiction to entertain this appeal either as an interlocutory appeal from an injunction order under Section 1292(a)(1), or as an appealable final order or an appealable collateral order under 28 U.S.C. § 1291.

Background

On March 28, 2018, the government sought and obtained civil seizure warrants from the U.S. District Court for the Central District of California for most of the accounts and domain names identified in a criminal indictment brought the same day against Movants in the District of Arizona.[1] In addition to the criminal charges, the indictment seeks to forfeit bank accounts, real property and domain names. On April 6, 2018, the day the government revealed the criminal indictment

[1] *United States v. Lacey, et al*., D. Ariz. No. CR-18-00422-PHX-SPL (forfeiture allegations at ¶¶ 157-171) (ECF No. 3). On July 25, 2018, the government filed a superseding indictment in the District of Arizona, adding new forfeiture allegations.

to the Movants, it (i) executed the civil seizure warrants, arrested Movants, searched the homes and properties of Movants Lacey and Larkin and seized anything of value law enforcement could find, and (ii) executed United States Postal Service ("USPS") administrative seizure warrants on many of the properties subject to the civil seizure warrants and additional assets as well. On April 26, 2018, the government instituted a third wave of civil seizure warrants. The government's efforts to seize assets have been ongoing, including, most recently, efforts to seize attorney trust accounts established for the Movants' defense. [*See* Emergency Motion to Stay Seizure of Attorneys' Fees and Request for Immediate Hearing, ECF Nos. 360, 365, 376, D. Ariz. 18-CR-00422].

The government's legal theory supporting the civil seizures (and the theory set forth in the indictment) is that the publication of third-party classified advertisements on the website Backpage.com knowingly facilitated prostitution, and that Movants' ownership of and/or involvement with the website violated the Travel Act and federal money laundering statutes. The government obtained seizure warrants based on affidavits from a postal inspector asserting probable cause to believe that most of the advertisements posted on Backpage.com related to illegal prostitution. The warrants were issued *ex parte*. No adversary hearing has yet been conducted to test the validity of the government's allegations. Altogether, the

government has seized tens of millions of dollars in assets alleged to be tied to illegal activity on Backpage.com. [2]

Movants filed a Motion to Vacate or Modify Seizure Warrants on August 1, 2018. [Motion to Vacate, ECF No. 6, C.D. Cal. 18-CV-06742 (the "Motion")]. They argued: (1) that the seizures are void because they are predicated on the erroneous premise that the government may seize the assets or proceeds of a publishing enterprise before trial based on a showing of probable cause regarding illegal activity; (2) if the seizures are not immediately vacated, Movants are entitled to a prompt hearing on the validity of the seizures in which the government has the burden of proof beyond mere probable cause; (3) the seizures also violate the Fourth Amendment because the seizure warrants were obtained through knowing or recklessly false statements and material omissions; and, (4) even without regard to the First and Fourth Amendments, the Seizures are markedly over-inclusive in violation of Movants' Fifth and Sixth Amendment rights. Accordingly, Movants sought an order immediately vacating the seizures and ordering the prompt return of their property. [*Id.*].

[2] Movants argue that millions of dollars seized are proceeds from print publications Larkin and Lacey owned before Backpage.com that should be excluded from the seizure warrants based on the government's theories of liability. However, those assets were part of the seizures because there has been no adversary proceeding to challenge the government's assertions.

The government has never filed a substantive response to Movant's arguments for vacating the seizures. After twice seeking and receiving extensions of time from the Central District of California for responding to the Motion, [ECF Nos. 32 and 40, C.D. Cal. 18-CV-06742], the government filed in the District of Arizona an "Application for Order Regarding Criminal Forfeiture of Property in Government Custody," seeking an order from a different jurisdiction governing possession of the property seized. [ECF No. 282, D. Ariz. 18-CR-00422]. It sought this order without informing the District of Arizona of the Motion pending in the Central District of California, without disclosing the existence of the pending hearing on that Motion, and without mentioning any of the arguments or case law raised therein. [*Id.*].[3] After again seeking leave to extend the deadline for responding, the government eventually filed an "Opposition" to the Motion, arguing that any motion for return of property should be filed in the District of Arizona under Rule 41(g) of the Federal Rules of Criminal Procedure. [ECF No. 53, C.D. Cal. 18-CV-06742]. This nominal opposition did not respond to Movants' constitutional arguments for vacating the seizures.

[3] After being informed of the pending proceedings in the Central District of California, Judge Logan declined to rule on the relief sought by the government until the U.S. District Court for the Central District of California rules on the Defendants' challenge to the civil seizure warrants. Order, No. CR-18-00422-PHX-SPL, ECF. No. 340 (D. Ariz. Oct. 16, 2018).

On October 5, 2018, the government began filing numerous complaints seeking civil forfeiture of the assets that had been seized pursuant to the original seizure warrants, as well as other property.[4] These filings were followed on October 12, by the government's *Ex Parte* Application to Stay Civil Proceedings. [ECF No. 79, C.D. Cal. 18-CV-06742]. Judge Klausner granted the stay application on an *ex parte* basis on October 23, citing 18 U.S.C. § 981(g) and observing "the government may seek a stay of civil forfeiture proceedings while it conducts a criminal investigation or prosecution." The Stay Order stated that a ruling on the Motion "could ultimately have preclusive effect on the criminal matter" and that the court saw no reason "why Movants' pending motions could not be brought in the criminal action" in Arizona. [ECF No. 85, C.D. Cal. 18-CV-06742]. This appeal followed.

The government's aggressive seizures have continued and included civil seizure warrants directed to various defense counsel, including Davis Wright Tremaine LLP, co-counsel on this appeal. When defense tried to challenge the seizures in Arizona, the government responded:

> Our position is that any attack on the warrants, the affidavits themselves, should be brought before the CDCA court. Those attacks are properly brought before that. Whether it is *Franks* hearing or whatever motions they feel appropriate to attack those affidavits are appropriate there.

[4] *See* ECF Docket for C.D. Cal. 18-CR-06742 (listing 27 Related Cases).

[Transcript of Record at 7:10-7:14, Nov. 16, 2018 Hearing, D. Ariz. 18-CR-00422]. The district court in Arizona "decline[d] to exercise jurisdiction over the [C.D. Cal.] seizure warrants." [*Id.* at 55:2-55:3]. It explained:

> [T]he Ninth Circuit Court of Appeals has held that considerations of comity and orderly administration of justice demand that the non-rendering court [D.AZ] should decline jurisdiction of an action and remand the parties for their relief to the rendering court [*i.e.*, the C.D. Cal.].

[*Id.* at 55:14-55:18]. Because the Central District of California stayed Movant's challenge to the validity of the seizure warrants (suggesting the issue could be raised in Arizona), and the District of Arizona now has declined to consider the validity of the seizures, the courthouse doors have been closed to Movants.

On October 31, this Court issued an Order raising questions about the jurisdictional basis for the appeal and requiring appellants to move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. [Order, ECF No. 90, C.D. Cal. 18-CR-06742]. Appellants' response setting forth the basis for the Court's jurisdiction is set forth below.

Argument

I. The Seizures and Stay Are Appealable Injunctions Under Section 1292(a)(1)

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1292(a)(1), which confers appellate jurisdiction over orders "granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1). In deciding if an order

is an appealable injunction under Section 1292(a)(1), courts look to the "practical effect" of the order, not whether the district court labeled it an "injunction." *Abbott v. Perez,* 138 S. Ct. 2305, 2318 (2018). In this case, the district court's Order staying this action has the effect of continuing the injunction restraining Movants' assets in place, and is thus an appealable order under the plain language of Section 1292(a)(1).

Numerous Ninth Circuit cases hold that the denial of injunctive relief followed by a stay is appealable under Section 1292(a)(1). *See e.g., Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.,* 569 F.3d 932 (9th Cir. 2017) (jurisdiction under § 1292(a)(1) for refusal to grant injunction and imposition of stay); *Privitera v. Cal. Bd. of Md. Quality Assurance,* 926 F.2d 890 (9th Cir. 1991) (same); *Agcaoili v. Gustafson,* 870 F.2d 462 (9th Cir. 1989) (same). Other circuits are in accord. *See, e.g., Goldberg v. Carey,* 601 F.2d 653 (2d Cir. 1979).

This Court has held repeatedly that orders restraining assets are appealable as injunctions under Section 1292(a)(1). *See United States v. Ripinsky,* 20 F.3d 359, 361 (9th Cir. 1994) (holding that "[a] pretrial order restraining assets is a preliminary injunction … and is therefore appealable as such."); *United States v. Roth,* 912 F.2d 1131, 1133 (9th Cir. 1990) (an order under 21 U.S.C. § 853(e) is a preliminary injunction directly appealable under Section 1292(a)(1)); s*ee also United States v. Spilotro,* 680 F.2d 612 (9th Cir. 1982) (jurisdiction over order restraining assets pending resolution of related criminal charges because "denial of interlocutory

review might cause the defendants' rights to be irreparably lost or impaired because the due process challenge to the order would become moot upon final disposition of the criminal trial.").[5] The stay order below freezes in place the asset seizure orders and thus is immediately appealable under 28 U.S.C. § 1291(a)(1).

II. The Stay Order is Immediately Appealable as a Final Order or as an Appealable Collateral Order Because it Effectively Forecloses Review on the Merits of Defendants' Constitutional Claims

A. Staying the Proceedings and Refusing to Rule on Defendants' First Amendment Challenge to the Asset Seizures is an Appealable Final Order

Even if the Stay Order were not immediately appealable as an interlocutory order under Section 1292(b)(1), the Stay is an appealable final order under Section 1291 because it effectively decides the substance of this case and leaves Movants "effectively out of court." *Davis*, 745 F.3d at 1308-10.

The Supreme Court established this principle in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 7 (1983), where a contractor sued in federal court for an order to compel arbitration in response to a hospital's state claim seeking

[5] Other circuits agree. *See, e.g.*, *United States v. Real Prop. Located at 1407 N. Collins,* 901 F.3d 268, 272 (5th Cir. 2018) (appellate court had jurisdiction over defendants' appeal from district court's denial of their challenge to government's pretrial seizure of their assets because "the district court's order has 'the practical effect' of granting or denying an injunction."); 16 C. Wright *et al.,* Federal Practice and Procedure § 3922.3 (3d ed. 2018) ("Orders controlling the use of property involved in forfeiture proceedings have been held [immediately] appealable, no doubt in part because of the drastic consequence threatened by the modern uses of forfeiture.").

a declaration that the parties' contract granted no right to arbitration. The district court stayed the federal case pending resolution of the arbitration question in state court, but the Supreme Court concluded that the district court's stay order was immediately appealable under Section 1291 because it effectively amounted to a final order for purposes of jurisdiction. *Id*. at 9. The Court explained that, as a result of the stay, there would be "no further litigation in the federal forum," and the state court's judgment on the arbitration issue would be *res judicata* as to future claims. *Id.* at 10. Because the state court proceedings would have mooted the federal case and left plaintiff "effectively out of court," the stay order was immediately appealable. *Id.*

This Court, following a majority of other circuits, extended the *Moses H. Cone* Doctrine to allow the immediate appeal of a stay order that "impose[s] lengthy or indefinite delays." *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.,* 490 F.3d 718, 723 (9th Cir. 2007). In *Blue Cross,* defendants sought a stay of the civil action because several of them faced a serious risk of criminal prosecution, and discovery in the civil case implicated their Fifth Amendment rights. *Id.* The district court granted the stay, and this Court found it had jurisdiction to review it, concluding:

> [L]engthy and indefinite stays place a plaintiff effectively out of court. Such an indefinite delay amounts to a refusal to proceed to a disposition on the merits. Even if litigation may eventually resume, such stays create a danger of denying justice by delay.

Id. at 724 (internal citations and quotations omitted). The Court observed that an 18-month delay is "sufficient to place the plaintiffs effectively out of court." *Id.* at 1309. This is particularly a problem when protection of civil liberties is at stake. Thus, in *Davis*, this Court held a stay order was immediately appealable to allow a state prisoner's claims regarding involuntary medication and abuse to go forward, because the lengthy and indefinite delays would render the plaintiff "effectively out of court." *Davis*, 745 F.3d at 1309.

That is precisely Movants' situation. Their Motion in the Central District of California has been stayed, and the district court in Arizona has refused to assert jurisdiction over their claims. [Transcript of Record at 55:1-60:3, Nov. 16, 2018 Hearing, D. Ariz 18-CR-00422]. Therefore, their constitutional challenge to the pretrial seizures at issue in the Motion will not be heard until *after* the criminal trial, at which point the primary claims (that First Amendment proceeds cannot be seized before trial and Movants have a Fifth Amendment right to a prompt hearing) will be moot.[6]

[6] The seizures began in April 2018, the criminal trial is currently scheduled for January 2020 and is expected to last months. [Scheduling Order, ECF No. 131, D. Ariz. 18-CR-00422]. If Movants are convicted, their sentencing and the resolution of their forfeiture claims will occur months or even years later. *See generally* Fed. R. Crim. P. 32.2. The trial date will almost certainly be continued. At hearings in October 2018, Judge Logan suggested that a January 2020 trial date seemed unrealistic given the volume of discovery. [Transcript of Record at 120:23-121:4, Oct. 5, 2018 Hearing, ECF No. 348, D. Ariz. 18-CR-00422]. Since then, the government has begun seizing defense counsel trust funds necessary to defend these

The importance of an immediate appeal in these circumstances has long been recognized in cases involving restrictions on First Amendment rights. Thus, in *Nat'l. Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), the Supreme Court treated a stay order of the Illinois Supreme Court as a final order and reversed. The Court held that delay in considering an immediate (and expedited) appeal would be an ongoing burden on rights protected by the First Amendment. *Id.* at 43-44. *See also United States v. P.H.E., Inc.*, 965 F.2d 848, 857 (10th Cir. 1992) ("[F]ederal courts have asserted jurisdiction in a number of contexts involving non-final orders, in which the proceedings complained of infringed on First Amendment rights."). *Cf. Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979) (immediate appeal of criminal defendant's motion to dismiss permitted under the Speech or Debate Clause).

The Court reached the same conclusion in *Fort Wayne Books,* 489 U.S. at 55, a case that, like this one, involved the constitutionality of seizing publishers' assets prior to conviction. There, the assets and proceeds from the sale of adult books alleged to be obscene were seized under provisions of state law authorizing pretrial

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Movants. Thus, it is likely that at least some of the Movants will need to have indigent defense counsel appointed, thereby further delaying the trial date. Movants' Motion is also premised on their Fifth Amendment right to a prompt, pretrial hearing on the propriety of the seizures. *See United States v. Crozier,* 777 F.2d 1376, 1383 (9th Cir. 1985).

seizures under a judicial order issued on probable cause. *Id*. at 51. Defendants sought to vacate the seizures on constitutional grounds, but the trial court denied relief and certified the issue for interlocutory appeal. After the Indiana Supreme Court affirmed the trial court ruling, the defendants sought review by the U.S. Supreme Court, despite 28 U.S.C. § 1257, which limits certiorari jurisdiction over cases challenging the constitutionality of state statutes to "[f]inal judgments or decrees" of state courts. Notwithstanding the finality requirement, the Court took jurisdiction, finding "it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Id*. at 56. *See also Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 246-47 & n.6 (1974) (same). [7]

Whether or not these conclusions are valid in a typical case involving seizures, the government has no greater constitutional authority to seize publishing proceeds in criminal proceedings than it does in the civil context. *See, e.g.*, *Fort Wayne Books*, 489 U.S. at 63. Where the First Amendment question to be decided is whether the

[7] The Supreme Court held that the same constitutional limits apply to seizing the proceeds of publishing activities alleged to be tied to crime in *Simon & Schuster, Inc.*, 502 U.S. at 115 (such a seizure is "presumptively inconsistent with the First Amendment" to the extent it "imposes a financial burden on speakers because of the content of their speech"). *See also Citizens United*, 558 U.S. at 336-337 (laws suppressing speech include "imposing a burden by impounding proceeds on receipts or royalties").

government can seize such proceeds prior to conviction (or at least prior to an adversary hearing), a stay deferring review to the end of the criminal case effectively decides the issue and leaves Movants without a remedy. Delay *is* the decision.[8]

Contrary to the district court's assumption, Movants' have no avenue for relief via a "*Monsanto* Motion" under Rule 41(g) in the Arizona criminal case.[9] The

[8] This Court's decision in *Andersen v. United States,* 298 F.3d 804 (2002) is not to the contrary. *Andersen* did not involve asset seizures but dealt with property seized for purposes of a criminal investigation and possible use as evidence in a future criminal case. *Id*. at 806. It is for that reason the majority construed the request as a Rule 41(e) motion. *Id*. at 808. In *Andersen*, the plaintiffs brought a civil case that attempted to interfere with a criminal case by forcing the government to return evidence it could potentially use in the criminal case. In this case, by contrast, the civil case was initiated by the government, and there is no indication that any of the seized assets are intended to be used as evidence in the criminal case. Rather, this is a straight asset forfeiture. In construing *DiBella v. United States*, 369 U.S. 121 (1962), the applicable Supreme Court case, the *Andersen* majority observed that the Court gave two reasons for refusing to create an exception to the general finality rule: It was concerned with impeding the criminal justice process, including the Sixth Amendment right to a speedy trial, and it concluded that Rule 41(e) motions are not independent of the associated criminal investigation and thus not severable from the "larger litigious process." *Andersen,* 298 F.3d at 809. However, neither of these reasons apply to this case because the assets were seized by civil processes, not criminal warrants, and there is no indication that the government intends to use any of them in prosecuting the criminal case. Also, *Andersen* did not present a situation like the one here, where the pretrial seizure of proceeds with no adversary hearing is itself an ongoing First Amendment violation.

[9] *See* Stay Order, ECF No. 85 at 2, C.D. Cal. 18-CV-06742. Rule 41(g) (formerly Rule 41(e)) provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). Any claim for the return of property based on *United States v. Monsanto,* 491 U.S. 600 (1989), involves Fifth and Sixth Amendment rights.

District of Arizona has ruled that it will not assert jurisdiction over seizures based on warrants issued in the Central District of California. [Transcript of Record at 56:1-56:10, Nov. 16, 2018 Hearing, D. Ariz 18-CR-00422]. Even if the Arizona court would take on the issue (as Central District of California assumed it would), *Monsanto* speaks to a much different (and narrower) issue—whether asset seizures may be excessive and deprive a criminal defendant of effective counsel. The defendant must make a threshold showing that seized assets are needed to pay for his counsel of choice, after which the court must conduct a post-seizure, adversary "*Monsanto* Hearing." Here, by contrast, Movants challenge the government's right to hold *any* of their assets as a matter of First Amendment law, and it is the *government's* burden to prove that the assets are subject to forfeiture. *Fort Wayne Books,* 489 U.S. at 63 (1989); *Simon & Schuster, Inc.*, 502 U.S. at 115.

Unlike the process provided in a *Monsanto* hearing, for seizures of publishing assets, the burden of initiating judicial review and of proving that the material is unprotected expression is on the government, and requires final judicial determination on the merits. *Blount v. Rizzi*, 400 U.S. 410, 420-22 (1971). Accordingly, the district court's citation of *United States v. Unimex,* 991 F.2d 546

(9th Cir. 1993), in the Stay Order, suggesting it provides a "remedy," is inapposite.[10] Even if the suggested remedy addressed the same constitutional issues, Rule 41(g) is an inadequate vehicle to provide relief in this case.[11] Accordingly, the Stay Order at issue here is a final order for purposes of appeal.

B. The District Court's Stay Also is Appealable Under the Collateral Order Doctrine

Even if the Stay Order is not deemed a "final order" for purposes of 28 U.S.C. § 1291, it still is appealable as a "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Collateral Order Doctrine recognizes "that § 1291's reference to 'final decisions' includes certain interlocutory orders that 'finally determine claims of right separable from, and collateral to, rights asserted in the action[.]" *Walker*, 745 F.3d at 1308 (citing *Cohen*, 337 U.S. at 546). "To fall within the small class of collateral orders that may be immediately appealed

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[10] While the prospect of some form of relief under *Monsanto* does not affect the appealability of the Stay Order below, Movants reserve their right to seek relief under *Monsanto* in an appropriate circumstance.

[11] This is true for several reasons. First, Rule 41(g) is not available as a criminal motion once civil forfeiture complaints are filed, as they were here. *United States v. U.S. Currency $83,310.78,* 851 F.2d 1231, 1232-33 (9th Cir. 1988); *Omidi v. United States,* 851 F.3d 859, 862 (9th Cir. 2017) (Rule 41(g) motions are not available after civil forfeiture proceedings are initiated). Second, Rule 41(g) by its plain terms requires the motions be filed "in the district where the property was seized," so it is unclear how the district court in Arizona could exercise jurisdiction over assets seized pursuant to warrants issued in the Central District of California. *See Unimex,* 991 F.2d at 550-51.

under *Cohen,* the order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Walker*, 745 F.3d at 1308 (citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978)).

The *Cohen* factors are satisfied here. First, the Stay Order conclusively determines disputed questions in the forfeiture proceeding in the district court including 1) the constitutionality of seizing publishing proceeds before trial and 2) Movants' right to a prompt hearing. The stay renders those constitutional violations a *fait accompli*. Second, the district court stayed the Central District of California proceedings because of a potential *res judicata* effect on the Arizona criminal case. This is a completely separate issue from the merits of Movants' Motion. Third, the Stay Order will be unreviewable if not appealed immediately. Again, the case below is premised on the unconstitutionality of the *pretrial* seizure of publishing proceeds and the violation of Movants' right to a *prompt* hearing. An appeal of those issues *after trial,* and years in the future, would be pointless. *See Lockyer v. Mirant*, 398 F.3d 1098, 1104 (9th Cir. 2005) (citing *Marchetti v. Bitterolf*, 968 F.2d 963, 966 (9th Cir. 1992) (unreviewability factor met where it was likely that case would be mooted)).

The Collateral Order Doctrine often has been cited as an additional reason to allow immediate appeals in cases involving First Amendment rights. In *Village of*

Skokie, for example, the Supreme Court found that a refusal to stay an injunction was immediately appealable under *Cohen* because the denial of First Amendment rights was "separable from, and collateral to" the merits, and failure to take jurisdiction would ignore the "strict procedural safeguards" required in free speech matters, "including immediate appellate review." 432 U.S. at 44. Similarly, the Tenth Circuit in *P.H.E., Inc.* held that the Collateral Order Doctrine applied where the government used "the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights." 965 F.2d at 855. Under those circumstances, it found the district court's order implicates "important right[s] which would be 'lost, probably irreparably,' if review had to await final judgment." *Id*. (citation omitted). The Stay Order at issue here is appealable under the same reasoning.

Conclusion

For the foregoing reasons, this Court should find that it has jurisdiction to hear this appeal under 28 U.S.C. §§1291 and 1292(a)(1) and should maintain the expedited briefing schedule issued by Order of November 1, 2018. [Doc. No. 1].

RESPECTFULLY SUBMITTED this 20 day of November, 2018.

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